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Ambidextrous Lockeanism¹

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Abstract

Lockean approaches to property take it that persons can unilaterally acquire private ownership over hitherto unowned resources. Such natural law accounts of property rights are often thought to be of limited use when dealing with the complexities of natural resource use outside of the paradigm of private ownership of land for agricultural or residential development. The tragedy of the commons has been shown to be anything but an inevitability, and yet Lockeanism seems to demand that even the most robust common property arrangements be converted to privatised units. This often motivates a move away from natural law in the moral analysis of property rights. I argue however that it is not the deontological nature of Lockean principles that are at fault, but rather the manner of their application. Lockean theory often exhibits a bias in favour of private property: assuming that only private property can protect one's interest in autonomy, and therefore asserting that each individual has a power of private acquisition. Starting with a claim against interference however enables us to mould the appropriate property rights to each individual's particular interest in autonomy. This sometimes leads to private ownership, but often leads to various forms of commons.

Key words: Locke, Ostrom, Original Acquisition, Property, Commons, Natural Rights, Natural Law

¹ Thanks are due to Liam Shields for suggesting the 'ambidextrous' prefix to my view of property acquisition, and to Shruti Rajagopalan for encouraging me to write this paper.

Introduction

Contemporary political philosophers who take property rights seriously often regard them as the most appropriate juridical protection of one's liberty – or more specifically, one's fundamental interest in autonomous project pursuit² (Kant 1779; Nozick 1974; Lomasky 1987; Mack 1990; 1995; 2002; 2010; Waldron 1990; Steiner 1994; Ripstein 2009; Tomasi 2012). Whilst humans are essentially purposive beings (Aristotle 2009: I.1), we are also essentially social beings (Aristotle 1981: 1253a). Therefore, these projects are not necessarily in isolation of others but often in combination with them. What is crucial, however, is that we get to choose how to cooperate with others. This means we not only need liberties and claims to extra personal resources, but also powers over those liberties and claims, so that we can exchange them with others.³ When we cooperate with others voluntarily, the collective end becomes one of our own ends. When we are conscripted, however, we become a mere means to the ends of others. (Kant 1779: II.18)

Such deontic accounts of property connect our rights over extra-personal resources to our personhood. We respect a person by complying with her property rights. Rather than connecting that compliance with scaled up, macro-level social goods such as aligning incentives to contribute to overall welfare, these accounts take the primary value of such compliance to be what those acts of compliance are in and of themselves – acts of respect for persons as purposive agents.⁴

These general kinds of deontic considerations with regard to the value of property rights are often leaned upon as moral reasons for upholding *some kind* of private property system. It is often thought that the deontic account justifies property systems at the macro level, but can do little to tell us which property rights ought to be favored at the micro level – that is, what the

² So as to avoid unnecessarily committing myself particularly to the interest theory of rights, property rights can equally be understood as protecting one's capacity to make unilateral choices in accordance with one's will. On the distinction between the interest- and will-theoretic accounts of rights, see Raz (1986: ch. 7, esp. 161) and Hart (1982: chs 7-8), respectively.

³ David Schmidtz says "knowing I can walk away makes it safe for me to turn up." (cite 'Taking Responsibility')

⁴ Whilst considerations of the common or aggregate good may play some role in determining the precise content of what our rights are, the primary value of rights is not to be identified with the promotion of that good. (Finnis 1980; Long 2002; Den Uyl & Rasmussen 2005)

precise shape of whose rights to what kinds of resources ought to be. Richard Epstein and David Schmidtz, for example, believe that there are strong deontic reasons to think that persons have *some* property rights but believe that ultimately the marginal questions as to their content and distribution are answered by looking at the scaled up effects of the rival answers (Epstein 1994; 1998: ch. 9; 2015; Schmidtz 2009; 2010; 2011; cf. Russell 2018; forthcoming).⁵

There are some that view the ultimate working out of the fuzzy edges as dominating the moral space in which property rights, qua the elementary particles of justice, are assigned, and hence dwarfing the import of the deontic reasons for supporting a property system at all. If justice is open enough for us to tweak the contours of the property system to ensure an expansion of aggregate benefits, then the first order deontic considerations connecting property with person become vanishingly relevant, and the analysis of different kinds of property conventions becomes the real site of theorizing justice.⁶

Indeed, some pursue this line of reasoning so far as to render the structure of our property rights *wholly* subservient to other kinds of considerations of justice, such as distributive justice and/or democratic equality. If our property rights can be tweaked without damaging our ultimate deontological interest in project pursuit, then massive re-ordering of the property system is consistent with that aspect of justice, and hence can become a mere tool of securing distributive justice or the democratic will (Murphy & Nagel 2002). Arthur Ripstein refers to such views as following a ‘public law in disguise’ model of property (2006: 1291; 2009: 86-90), in which private law has no distinctive moral standing *per se*, but is a mere tool for public law.⁷

In this paper I want to show that we can afford to take seriously the primacy of our deontic interest in project pursuit, and thereby temper the inclination to back away from Lockeanism. Specifically, I want to show how it can do a lot more work than one might initially think, stopping in its tracks the temptation to lean on macro-level consequentialist considerations at the margins. Each person’s fundamental moral status that is appealed to, one way or another, in deontological

⁵ Epstein and Schmidtz are highly friendly toward Lockeanism, but nonetheless do not embrace Lockeanism *all the way down* because of important work they take it to be unable to do, namely explain when and how we need non-private forms of property.

⁶ Ben Bryan alludes to such a view (2017).

⁷ This is not totally without irony, however, since Ripstein’s own Kantian account of natural rights is such that they are radically indeterminate until enshrined in the positive law of a state – a state that has very wide discretion in ordering to property system away from its “natural” structure toward a structure demanded by distributive justice (2006; 2009: 155) also see Stilz (2009, 40) and Hasan (2018), against this interpretation of Kant, see Tésón & van der Vossen (2015).

arguments for private property can also be used to ground common forms of property where they are appropriate. That private property is no panacea, then, is no reason to reject Lockean natural law approaches to property.

Arguments connecting person with property, such that our deontic respect for persons must extend to compliance with property rights, typically centre around the question of original acquisition. This is a heuristic device – typically associated with John Locke (1689) – for working out when and why we ought to respect property rights in virtue of our respect for personhood generally. Original acquisition is what happens where persons interact with virgin resources in some way which extends our duties to them as persons to duties of compliance with certain property rights. It is an application of our more basic rights over ourselves to rights over extra-personal resources.⁸

Accounts of original acquisition are typically limited to explaining when, how, and why privatisations of the commons are legitimate. I will argue here that this is wrong-headed, and exudes an implicit prejudice in favour of private property and against commons arrangements.⁹ A modified Lockean theory can give deontic justification for a full spectrum of property rights including private ownership, easement, usufruct, public, and collective property, as well as combinations thereof. This modification in fact makes Lockeanism more parsimonious rather than less. As I will argue, the existing complexity of Lockeanism, such that it is, is actually borne of its need to self-correct its prior bias in favour of private ownership.

Lockeans typically carry some implicit bias in favour of private property. It is often assumed that is the only way to apply individuals' abstract interest in autonomous project pursuit. The philosophical work takes place in examining when this power might be legitimately restricted. Locke famously said that one could acquire ownership of natural resources so long as one left 'enough, and as good' for others (1689, II.V.27). Rather than a holistic principle that tells us which particular kinds of property rights persons can have in resources depending on the kinds of resources they are and how they are used, the theory presumes private ownership is the only kind of property, and tells us how to not let it go too far. This means that property systems that precede

⁸ If not a straightforward application of more basic rights, a moral power that shares justification with that of more basic rights (Lomasky 1987; Mack, 1990; 2010; van der Vossen 2009).

⁹ Whilst no Lockean would deny that forms of common property could emerge through *contract* (joint-stock companies, etc.), there is no evidence that many of them think common property can emerge through *acquisition*. There are two exceptions (Long 1996; 1998; Holcombe 2005), but in neither is account of why Lockean principles sometimes generate private property rights and sometimes others, and when, is to be found.

typical Western style land ownership are rendered illegible and presumed by Lockean theory to be in a state of non-ownership. The village communes in pre-enclosure England, or the native American territories, etc.,¹⁰ are not regarded as settled property systems simply because they did not consist in enough fee-simple, private ownership. This has led some to argue that early modern property theorists were not necessarily interested in developing a universalist account of property and justice, but rather, primarily with the establishment of European property systems in the Americas, and their concomitant administration by European states (Tully 1994: 156; Arneil 1996). The theory followed the political goal, rather than the other way around. Whilst those whose lands or resources are subject to expropriation in putatively Lockean fashion were not deemed to be without *any* moral consideration, it is just that they are rarely considered to have property rights on a par with those that the appropriator seeks. Instead, they merely had some claim to compensation thereafter, or assurance that the private property system will serve their welfare at least as well as their archaic system did.¹¹

A positive account of what connects person with property would not need a countervailing principle to limit it because it would protect persons who have property rights that are not rights of private ownership from having those rights unilaterally acquired by a prospective privatiser. Problematising the connection between person and particular resources means we don't start with a one size-fits-all presumption, and then have to appeal to ad hoc principles when that size in fact fails to fit persons' actual interests in project pursuit.

The implicit bias in favour of private property is well displayed in Robert Nozick's discussion of original acquisition. He never gives a positive account of how or why it is that individuals can acquire ownership over parts of the hitherto unowned world, but merely describes why private property is desirable for other, non-rights based reasons, and then discusses potential checks to the power of acquisition which might also be desirable.¹² Thus assuming that private

¹⁰ Of course, not only did the native American nations have property systems at the time of European settlement, but these included a lot of private ownership (Anderson 1997; 2006). Likewise, the English village commune was not an ungoverned open-access regime, like that considered by Hardin, but a fairly robust property system that developed customarily (Dobb 1946; Carson 2011).

¹¹ Contemporary Lockeans do not regard Lockeanism as doing this kind of political work – quite the contrary. Nonetheless, this ideological genealogy does leave Lockeanism in similar shape to do so, even if that is not their intention. Hence the need for an explicit account of various kinds of property – and not a one-size fits-all to be imposed upon those that do not conform.

¹² He does, however, offer a negative account of why property systems that permit the coercive extraction of wealth by one group from another exhibit partial ownership of the extractees by the extractors (Nozick 1974: 172) and that

ownership is the only kind of property right that can protect our fundamental interest in project pursuit.

Here enter the various familiar social considerations favoring private property: it increases the social product by putting means of production in the hands of those who can use them most efficiently (profitably); experimentation is encouraged, because with separate persons controlling resources, there is no one person or small group whom someone with a new idea must convince to try it out; private property enables people to decide on the pattern and types of risks to bear, leading to specialized types of risk bearing; private property protects future persons by leading some to hold back resources from current consumption for future markets; it provides alternate sources of employment for unpopular persons who don't have to convince any one person or small group to hire them, and so on. These considerations enter a Lockean theory to support the claim that appropriation of private property satisfies the intent behind the "enough and as good" proviso, *not* as a utilitarian justification for property. (1974: 177)

The power is supposed to be the manifestation of our own interest in control of extra-personal resources, and the proviso is supposed to ensure that the rights we acquire do not entrench upon other persons' like interests (Attas 2003; cf. Scanlon 1976: 23). This two-stroke approach demonstrates the poverty of the implicit theory of property that lies behind many Lockean theories: that we know that private ownership is what is required to protect persons' respective interests in autonomous project pursuit, and yet we need a proviso to protect the residual interest that are left by the way-side by this very power of privatisation. As Jeremy Waldron articulates it:

the idea that individuals can, by their own unilateral actions, impose moral duties on others to refrain from using certain resource... is a very difficult idea to defend *in an unqualified form*. (1988: 253, emphasis added)

this is contrary to liberty (160-164). So this could be construed as an argument in favour of a natural right to property, but not an account of the how and when such a right manifests; in other words, and theory of original acquisition.

If we did not assume private property was the panacea for project pursuit, it would not stand in need of qualification.

We need not assume that private ownership is the only way of concretising an individual's interest in autonomous project pursuit. It is manifestly possible for a resource to be used by a variety of agents in a non-rival way without any one of those agents having unique authority over it (Levine 1986; Rose 1986; Scott 1998; 2014; Carson 2011; Ostrom 1990; 2003; 2012; Ellickson 1993; Gardner, Ostrom & Walker 1994; Schmidtz 1994; McKean & Ostrom 1995; Pennington 2013). So where individuals' interest in a given project does not extend as to justify her total ownership of it, there is no need – deontologically speaking – to presume she must have ownership of it.

The modification to Lockeanism defended here starts with persons' basic claim to autonomous project pursuit, and then applies this to extra-personal resources, to see how different kinds of property right protect that interest with regard to different kinds of resources in different kinds of contexts. As I will show, we can end up with a highly mixed property system that includes private ownership, but in no way demands it in every case.¹³ Rather than assuming we know what kind of property rights are needed to protect persons' property interests, we should start out agnostic, and see where persons' actual property interests lead us. Such an account needs no proviso because it adequately moulds property rights to the actual property-based interests individuals have in the first place. The proviso mops up the mess of the implicit assumption that private property is a panacea. Where the account of original acquisition makes no mess, we need no mop.¹⁴

One of the important implications of ambidextrous Lockeanism, then, is that any residual justice-based complaint anyone legitimately has against an appropriation is a surrogate for a complaint about the violation of one of more of her non-interference-based property rights by the appropriator.

¹³ Some Lockeanism have gestured toward how original acquisition can underwrite various kinds of common property (Long 1996; 1998; Holcombe 2005), but there is, as yet, no explanation of how a single principle demands private ownership in some cases, and some kind of commons in others. That is what I do here.

¹⁴ In the existing literature on Lockean acquisition, the proviso is very much where the action is. A recent example demonstrating as much is Kogelmann & Ogden (2018).

Nozick invokes a Kaldor-Hicks¹⁵ proviso to protect those who have resources that they are actively engaged in the use of appropriated by a new-comer. He argues that since (and if) they are made worse off by their deprivation of access to this resource, the appropriator must make a transfer to them in specie or kind in order to justify the appropriation. (Nozick 1974: 176; cf. De Jasay 1997: 171-180) Under the view developed here, any such ex post transfer only legitimises the appropriation with the consent of the transferees, since their prior use of the resource places a duty upon the newcomer not to interfere without their consent.

Steiner invokes an egalitarian proviso because of the purported possibility that the entire universe could become the private property of some individual or group, and therefore when new generations enter the universe, without a natural right to an equal share of that world (granted in his proviso), they would have no right to exist in that world (1994: 86-101; 2009: 241; cf. Spencer 1851: XI.II). Under the view developed here, the legitimacy of all property rights is naturally subject to their non-interference in the ongoing activities of others, which includes (at a bare minimum!) their existence and subsistence. The checking of all property rights against subsistence – insofar as non-interference in subsistence is presupposed by non-interference with ongoing activities – also removes the need for the a sufficientarian proviso countenanced by Fabian Wendt (2018). Any appropriation that turned out to interfere with a person's use of standing space or consumption of food etc. is a violation of that person's non-interference-based property rights.¹⁶

There are no doubt a number of different formulations of the proviso that could be made. However, as long as the proviso is a vehicle for rights-oriented considerations that are related to or consistent with liberty as non-interference, they can be catered for by non-interference itself given that private property will only ever be legitimate when properly grounded in non-interference itself.¹⁷

Before getting into the substance of the paper, an important caveat ought also be noted. I invoke the, now dominant, Hohfeldian analysis of rights as being liberties, claims, powers, and

¹⁵ A Kaldor-Hicks improvement takes place when the welfare of at least one party is improved such that any parties thereby made worse off can be compensated to at least restore the status quo ante by the improved party. Nozick's proviso follows this spirit because it permits one to violate the rights of others, so long as any welfare they thereby lose is compensated for by the violator.

¹⁶ The right of subsistence is a right that is automatically integrated into the system of acquired property rights, and is therefore in a strong sense, a property right itself (cf. Klimchuk 2013).

¹⁷ Hence, Michael Otsuka's formulation of an egalitarian proviso does not raise any concerns for us here (1998; 2003; 2006). The grounds for it are entirely orthogonal to our interest in project pursuit (Risse 2004) and are not even compatible with it (Inuoe, 2007).

immunities, with correlating duties, liabilities, and disabilities in third parties (Hohfeld 1913; 1917). The generic term “right” sometimes refers to any one or combination of the former four Hohfeldian incidents, and “duty” or “obligation” as anyone or combination of the latter three.¹⁸ When I say “right” I am referring to a Hohfeldian claim, which has correlative Hohfeldian duties in third parties.

Moreover, as the elementary particles of justice, property rights are sets of *legitimately enforceable* rights. It is a presumption of the general normative framework I am working within here that if something is a right, it is legitimate to enforce its correlating duties.¹⁹ Whilst coercive enforcement of duties of justice is legitimate; systematized coercion is not necessarily the most effective way of making sure those duties are complied with. In political philosophy, there is a bias toward the assumption that a vindication of, for example, some particular right, being a demand of justice, *just is* a vindication of the need for legal formalization of that right, and/or that right being the explicit subject of some policy of the state. The attainment of justice through non-state means of social organisation is assumed away (Brennan 2016: 243-247; 2017; 2018; Levy 2015; 2017; Byas & Christmas forthcoming). When we assume that justice is the unique and exclusive purview of Leviathan, we license Leviathan without adequate evidence that that licence would in fact serve justice in practice. Moreover, we analytically impoverish justice as it makes us pre-emptively blind to those social arrangements that are not typically achieved through Leviathan. Political philosophy is not legal or political consultancy, and political philosophers squander their skills when they proceed as if it is.

The appropriate institutionalization of the rights I discuss here might be “informal” social norms, consisting in normative expectations that induce compliance (Bicchieri 2006), or “formal” legal restrictions that threaten coercion to induce compliance, or most likely, a mutually complimentary combination thereof. Theorizing the moral content of the rules of justice as one thing or another does not thereby imply any particular institutionalization of those rules from the armchair. Philosophy tells us what would be morally permissible, not what would be most effective.

¹⁸ The reason there are four incidents correlating with three, is that a liberty correlated with what is sometimes called a ‘no-claim’ in third parties. Unless liberties are *vested* by some accompanying claim, which places duties of forbearance upon other, they are *naked* (or Hobbesian) (cf. Hart 1982, 171-3; Steiner 1994, 75-76; 87-91).

¹⁹ Though, within constraints of proportionality (Long 1993/1994).

Original Acquisition: Connecting Person and Property

John Locke famously said that individuals have natural rights, and can extend those rights to natural resources. Importantly, given that these rights are natural, they are both temporally and normatively prior to any political settlement.

Though the Earth and all inferior creatures be common to all men, yet every man has a property in his own person... The labour of his body, and the work of his hands, we may say are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath thereby mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by his labour something annexed to it, that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others. (Locke 1689: II.V.27)²⁰

This passage has been interpreted in a number of different ways by Lockean scholars, leading into at least five subtly different formulations of the principle of acquisition. I will outline some of these below as a prelude to showing how my own ‘ambidextrous’ version captures what is attractive in most other interpretations, without being exclusively concerned with private ownership, but also other kinds of property rights.

Physicalism. Some have understood the grounds for acquisition to be that, one owns one’s body, and that when one physically interacts with external objects, self-owned energy from one’s body is physically transferred into it. If those objects were not already owned by someone else, then their containment of one’s self-owned energy gives one the best claim.²¹

²⁰ This echoed many other natural law theorists, especially Hugo Grotius:

Almighty GOD at the Creation, and again after the Deluge, gave to Mankind in general a Dominion over Things of this inferior World. *All Things*, as *Justin* has it, *were first in common, and all the World has, as it were, but one Patrimony*. From hence it was, that every Man converted what he would to his own Use, and consumed whatever was to be consumed; and such a Use of the Right common to all Men did at that time supply the Place of Property, for no Man could justly take from another, what he had thus first taken to himself. (1625: II.II.II)

²¹ This is, roughly, the view of Samuel Wheeler III (1980) and Hillel Steiner (1994: 233). Steiner proposes it in reply to those who argue that labour itself cannot be mixed with physical objects, but rather is presupposed by the mixture of

Labour-Fruits. Rather than hinging on the physical relation of one's physiological body with external objects, the right of acquisition hinges on economic production. One owns 'the work of [one's] hands' not because of anything necessarily reducible to physics, chemistry, or biology, but because one has added value to the world, and ought to be the one to capture that value and thereby benefit from the work one invested.²²

Agnosticism. Robert Nozick offers some arguments for why private property rights ought to be regarded as natural (Nozick 1974: 160-174; cf. Brennan & van der Vossen 2018), but regards the question of what *particular* actions are sufficient to ground any particular acquisition as orthogonal to these.²³ Nozick is more concerned with what a *necessary* condition for an action to justify acquisition (Nozick 1974: 178-182; Wolff 1991: 114; Gibbard 1976: 83), namely, the condition that it not make anyone worse off than they would have been had the acquisition not taken place. As discussed above, Nozick is more interested in how the proviso restricts acquisition than how acquisition is to be justified in the first instance.

Conventionalism. This view is best understood as a development of Nozickian agnosticism. The right to private property has a basis that is independent of the normative status of the particular action taken to acquire something. Whatever the socially recognised convention for acquiring property is, one acquires by performing the relevant acquiring-action. Our natural right to acquire property only tells us that we ought to have *some* such convention, and that everyone has a right to participate in it, and a duty to comply with it. (Lomasky 1987: 123; Mack 2010)

A variant of this view is that the convention must take the form of some kind of physical interaction with the property being acquired. For example, Eric Mack (1990; 2009: ch. 2; 2010) argues that some sort of physical interaction with an object (the particular content of that action is

material by human action whatsoever (Hume 1738: II.II.VIth; Day 1966; O'Neill 1976: 471; Waldron 1983; 1988: 184-191; Thomson 1990: 325-326).

²² This view is often the one held by the more socialistic Lockians such as Thomas Hodgskin (1831) and Henry George (1929). However, Israel Kirzner – most certainly not a socialist – also favours something resembling this interpretation (1989). The difference between Kirzner on the one hand and Hodgskin and George on the other, is that Kirzner believes that the entrepreneurial labour of the capitalist is on a moral par with the more straightforwardly physical labour of her employees. On Hodgskin and George's view, however, whilst the capitalist's claim on productive output could in principle be vindicated by appeal to her entrepreneurial labour, her prior ownership of the capital itself has no such vindication. George moreover believed that the value of natural resources is existentially independent of human utilisation of them, which Kirzner's theory of entrepreneurship directly contests (Kirzner 1973; 1997). Hodgskin was not wedded to the Geogist wedge between the value of land and human effort, he just happened to think that most land-titles were not acquired through productive use of that land, but rather through political privilege. The labour-fruits view, then, is not a priori socialistic or capitalistic.

²³ Moreover, he expresses some basic doubts about both *physicalism* and *labour-fruits* (1974: 174-175).

largely arbitrary) is a salient, publically ascertainable sign that something has become owned by the acquirer and is now off-limits. It is simply a way of showing the community of other right-holders that one has particularized one's general right to private property (cf. Kant 1779: II.10; Ripstein 2009: 105; van der Vossen 2009; 2015). One can view physical interaction with a resource as simply providing a signal that one was the first occupant of the resource, and therefore the one with the best claim.²⁴ This is not a species of *physicalism* but of *conventionalism* because it merely specifies that a convention must involve physical interaction so as to be socially salient, not because physical interaction in itself carries any normative import.

The Ambidextrous View. The general spirit of all these accounts can be captured in a well-specified principle of acquisition, grounded in a claim against interference in one's ongoing, non-interfering activities. The reason Lockeans believe that persons can acquire private property rights is that as autonomous, social beings, they have a very strong interest in control over external objects. Moreover, we have a higher order interest in having *control over our control over* external objects. As mentioned above, it is crucial that we have power over our property rights (Hart 1982: chs 7-8; Steiner 1994: ch. 3). The reason the particular act that constitutes acquisition is important, beyond the mere fact that some external action is necessary to socially signal acquisition, is that our interest in controlling resources is very particular. Those resources that are subsumed within our ongoing projects or activities are the ones we need control over (Brennan 2014: 79). Locke mentions acts of 'labour-mixing' because laboring upon land is one important way – particularly in the times and places he was thinking of – of engaging physical objects into one's projects or activities (Thomson 1976: 665; Sanders 2002). When our activities constitute physically attaching or transforming external resources, the non-interference principle prohibits others from interfering in these activities, and with the objects themselves to the extent that it is necessary. When our activities are improving natural resources, the non-interference principle likewise protects these activities and their material substrata. Rather than there being some independent power of acquisition, acquisition is simply the *application* of the right to non-interference, after persons have acted upon or within the world.

Each individual, then, prior to any political settlement, has claim to non-interference in her ongoing, non-interfering activities. Correlatively, each also has a duty not to interfere with the

²⁴ Giving theoretical basis to the principle of *occupatio* in Roman Law (Gaius 160: II.66-67) On first occupation, also see Grotius (1625: II.II.II.5) and Hume (1738: III.II).

non-interfering activities of others. The principle of acquisition that this entails is that person's "acquire" property rights simply as applications of this claim to the particular activities they engage in with regard to extra-personal resources. The extent of a person's property rights will be that which is required to protect her ongoing activities.²⁵ Both private property and various forms of commons have the same basic deontic justification. The next section will show how an application of the claim against interference can ground private ownership. Thereafter we will see how it can ground forms of common property.

Private Ownership

How can a claim to non-interference ground a bundle of property rights like private ownership? One might be skeptical that private property can be justified by an appeal to non-interference in the use thereof. After all, the essential characteristic of private property – as opposed to other forms of property rights, like rights of usufruct – is that it allows one to exclude others from an object or space even when one is not presently using it (Schmidtz 2009: 7; 2010: 80; 2011: 599-600). Often, the right to exclude others from one's privately owned property is regarded as being *independent* of the particular use-rights one has to it. A. M. Honoré famously said that exclusive possession and use were independent incidents of ownership (1961). However, the right not to be interfered with can ground a sufficiently expansive right of exclusion, in certain cases, so as to make it indistinguishable from that which characterizes private ownership, without resorting to any independent, blanket right of exclusion. It is manifestly possible to use something in a way such that for anyone else to make almost *any* other use of it, would thereby interfere with your own use of it.

Some uses require the full (or near-enough full) exclusion of third parties (Christmas 2017b: 7-14). For example, when one cultivates a field and plants crops in the soil, there are very few uses of this land that can now be made by anyone else without interfering in one's crop-cultivation. Building on the land, or using the soil for alternative crops, are obviously ruled out, as this would immediately stop the crops from being harvestable, and hence interfere in one's activities. Indeed, one would also have the right to exclude others from building structures nearby that would block out the natural sun light, or from extracting all the water from the water table, or

²⁵ As Eric Mack argues, the claim to exclude another should only be strong enough to protect one's actual liberty interest with regard to any given resource (2015).

polluting the soil, or blocking one's access to the site, as these would all interfere with one's cultivation of crops. One would also have the right to exclude others from walking over the land as this would damage the crops. Of course, one will not have the right to exclude others from carefully walking along an easement to the side of the cultivated area, so long as one was not using this pathway for anything that was thereby interfered with. One would also not have the right to exclude persons from flying airplanes over the land. One does not have the logically strongest set of rights over the parcel, but one does have some rights beyond the parcel. This bundle of exclusion rights maps on pretty clearly to common notions of what it means to privately own land (Penner 1997).

While one has an open-ended right to exclude others – since there is a strong presumption that the use of the land by others would interfere with one's ongoing agricultural use of it – this right of exclusion is incomplete – since there are *some* uses of the land that can be made by others. Others can fly over it, impose innocuous pollution, etc. So one has 'a protected sphere of indefinite and undefined activity' (Penner 1997: 72), yet not to the point where others are excluded from effecting any physical change whatsoever within that sphere. Similar considerations take effect, to varying degrees, for any intensive use of hitherto virgin resources or vacant land for one's ongoing activities, such as building a permanent dwelling.

Of course, '[n]othing in the world is naturally of exclusive interest only to the one most closely associated with it.' (Penner 1997: 72), and therefore it is never going to be the case that one can acquire a totalizing exclusionary right over particular spatial sphere. No matter how expansive a person's use of a range of physical objects is, technological innovation always leaves open the possibility that *some* use could be made of the object without constituting interference. A model of private property that did not admit this would be a caricature, or worse, a straw man (Brennan & van der Vossen 2018). It is only critics of private property that take it to be totally exclusionary in this way (Railton 1985; Sobel 2012), and not those who actually understand it. Private property as 'sole and despotic dominion... in total exclusion... of any other individual' (Blackstone, 1751, §II.I) has always been more folklore than actual legal or moral practice.

Many uses of natural resources depend upon a stream of benefits from that resource generated by other persons' exclusion from it (cf. Fisher 1906: ch. 2; ch. 13), hence such uses of natural resource justify the acquisition of private ownership with such exclusionary characteristics. The use is expansive, so the claim against interference is expansive, which means the duties of

others to exclude themselves are expansive. Whilst this private ownership does not include the logically strongest right to exclude others – since there are some uses of the resource which do not run counter one’s interest in – private ownership need not include such an exclusionary right anyway (cf. Fressola 1981: 320, n.15).

What about when one’s use of a resource does not depend so much on other persons abstaining from the resource altogether? In the exact same way, one still has a right to non-interference in that use, leaving action-space open to non-rival uses of the same resource by others. This means that persons can acquire property rights more closely akin to easements or usufructs in resources. In this way, the right to non-interference also grounds various forms of common property, as well as private ownership.

The Commons

There are two forms of common property that can emerge through the application of the non-interference principle. I refer to these as collective property and public property. Collective property is when a resource is privately owned by a group of persons, what G. A. Cohen called ‘joint ownership’ (1995) and Carol Rose calls ‘property on the outside, commons on the inside’ (1998: 144). The group as a whole has the right to exclude (almost) any use of the resource by non-members.²⁶ Public property, on the other hand, is when there is an open-ended set of right-holders, each of whom has the right to use the resource in a fairly narrow way.²⁷ There is no collective who has the right to exclude all outsiders tout court because the set of users at the given time do not use it in a way that renders any (or nearly any) use by an outsider an interference.²⁸

It is crucial to distinguish public property from what Locke referred to as *the common* and is often referred to as *open-access*; where there are no persons, nor uses of the resource, which are excludable (Ellickson 1993). Such would better be understood as *non-ownership* – a sheer vacuum of property rights that is simply waiting for individuals to establish them. In Roman Law this is

²⁶ In reality, a lot of what we call private property in the real world is owned by more than one person. Think of married couples jointly owning their homes, or shareholders jointly owning a corporation. (cf. Ellickson 1993)

²⁷ Neither of these forms of common property ought to be identified with property owned or managed by the state or the nation. Each of these property forms is constituted by rights to particular uses of a particular spatio-temporal location, held by individuals. “Public” does not mean governmental, and “collective” does not mean national.

²⁸ The rights in question, insofar as they are held by *individuals*, are private rights, but they are not rights of private ownership in that there is any one individual that has the right to exclude all others from any particular resource. In the case of collective property, it is only in each exercising her individual right in tandem with all others that outsiders can be excluded from the resource altogether.

called *res nullius* and refers to resources which are not yet subject to any property rights, and hence are sites of original acquisition by first users. The two kinds of commons I discuss here are closer to variations of *res communis*: when resources are not used in ways that make them suitable to private ownership by an individual, and remain in a settled state of use by many persons.

Public property as I am conceptualising it does not sit easily within much of the existing categories discussed in the literature. Scholars often take what varies between property systems as *who* is excluded from a given resource, rather than what *uses* of the resource are excluded. This leads them to viewing property as being either private (fully owned by one or a few persons), or collective (fully owned by society at large, most likely governed by the state that purports to represent them), or unregulated open-access (where no one is excluded) (cf. Stevenson 1991; Ellickson 1993).

Elinor Ostrom famously shed light on how some natural resources are used in rule-governed, efficient ways, which nonetheless do not rely upon the power of a single locus of final authority – whether it be a private owner or a political authority (1990). Rather, where a number of persons or groups have an established interest in a resource, they find ways to use it without creating interpersonal conflict nor degradation of the resource.

Garret Hardin famously described a ‘tragedy of commons’ as arising where there was no ownership over a natural resource that was subject to use by multiple agents (1968).²⁹ Given that there is no agent with the power to exclude other users, no agent has an incentive to use the resource sustainably, since they cannot exclude other agents who might free ride on one’s sustaining activities and capture a greater share of the value of the resource. Hardin contends that resources must either be divided up so that discrete individuals own particular units, and given their right to exclude others, have an incentive to invest in the resource rather than degrade it. Or there must be Leviathan-like control of it by a collective representative that commands how it is to be used in a sustainable way. Within this picture, the key right in question is supreme power of control, and hence exclusion. The only question Hardin leaves to be answered is: who should be in control, Leviathan, or several private owners?

What Ostrom shows, however, is that we need not think of natural resource governance as a question of who has total control over a given resource. Rather than starting with the rule-maker,

²⁹ Similar observations have repeatedly been made at least since Aristotle (1981: II.III); Aquinas (1947: II.II Q66.2); Hobbes (1642: I; 1651: XIII; XIV) Lloyd (1833); Gordon (1954, 124); Olsen (1966).

she observes that sometimes we start with the rules. In Hardin's model, agents are not able to communicate anything other than their decision to deplete the resource or abstain from it. In the real world, however, those with common interest in a particular resource have some shared social fabric, such as a background of expectations, trust, etc. Rules can emerge through trial-and-error, through negotiation, and other forms of social intercourse other than sheer exercises of expulsive power. Rather than property rights being concerned with who the owners are, the way to understand what I call public property is what the permitted uses are. Where agents are able to converge on an appropriate set of usufructuary rules through intersubjective learning or dialogue, the tragedy of the commons is averted and a comedy of the commons takes place (cf. Rose 1986).³⁰

Such commons can emerge through unilateral and multilateral use of hitherto unused resources in conjunction with the application of the non-interference principle, as I now detail.

Public Property

When an individual uses a resource in a way that leaves action-space open for use by another, their acquisition of the relevant use-right is consistent with the resource's use by third parties, so long as those uses are non-interfering. In the case of cultivating a field of crops, the extent of that residual action space is extremely limited, so limited as to justify our calling the farmer's property right *ownership*. However, imagine that instead of cultivating a crop, the individual in question merely uses a beaten path to cross from one location to another. The non-interference principle implies that no third party may use the path or the land around it in a way that would obstruct the first user's use of the path as a thoroughfare. A third party could use the path herself as a thoroughfare, so long as she did not do so in an interfering way – say, by driving down it at a hundred miles an hour while the first user is also passing, thus endangering her. Imagine now that more and more people start using the thoroughfare. Each one uses the thoroughfare in a way that does not interfere (as per the non-interference principle), and in turn, as a new user is added, any prospective user may only use the resource in a way that is non-interfering of each of the existing users. This may be quite simple with regard to the use of a thoroughfare. If each person simply

³⁰ One might be concerned that without a final authority on the disposition of each spatio-temporal location, the rights in question might be impossible – that is, incompatible with each other. Steiner argues that all claim rights must be assigned to specific individuals to specific spatio-temporal locations, as I argue elsewhere, however, compossible rights can in fact be specified in terms of particular uses of those locations, as is the case of both kinds of common property discussed here (Christmas 2018: esp. §4).

uses it for walking down (one way or the other), the rules of use are fairly simple – don't obstruct the thoroughfare of others. With other kinds of resources used in other ways, a more complex set of rules will be required by the non-interference principle. Consider a large fishing pond. When an individual starts fishing, she acquires a right to the pond. No one may take the fish she catches, nor kick her off of the embankment, nor engage in noise pollution that scares all the fish away, or water pollution that kills the fish, etc. An additional fisher would not necessarily interfere, however. Assuming the second fisher's rate of capture did not come at the expense of that of the first fisher's, then her fishing is non-interfering.³¹

For these kinds of uses of resources – walking across an expanse of land and fishing in a pond – there is action-space left with regard to the resource such that there are relatively expansive uses by others still open (at least, the same use being made by the present user). I call resources subject to this composition of acquired rights *public property* because of the extent to which they are more open to new users than with private ownership. Whereas with the privately owned farm, so many uses by others are not permitted that it is functionally equivalent for all third parties to be excluded altogether (or nearly so), with public property, there are so many potential uses that permissibly could be made by third parties that the required property rules do not exclude all other persons, but more closely permits access by anyone, but importantly regulates their use to those that do not conflict with pre-established ones. Though I assign different labels to private and public property, the distinction is one of degree and not kind. The right to exclude is *always* contingent upon such exclusion being justified by the particular interest the user (or set thereof) has established in the resource.

One can imagine the resources that each member of a community use in the more fleeting, less intensive ways must remain subject to public property rules. No one may privately appropriate the public square without the consent of all those who presently have established easement rights to it, which is the class of persons who frequently pass through it such that its privatisation would constitute interference with. One can imagine public parks, streets, and squares emerging this way, as well as many rural, large-scale resources.

³¹ This applies whether or not the first user's rate of capture was sustainable relative to the natural rate of regeneration of the fishery or not. Of course, if it was sustainable, and the second user rendered it unsustainable, this would constitute interference.

Collective Property

Whatever the use of the public resource, however, there will be *some* point at which an additional user (making like use) will necessarily interfere with the existing users. There is an issue of establishing the cut-off point, but when there is a point at which another person along the path interferes with the existing users, or where another fisher in the pond, or another occasional swimmer in it, overcrowds the resource in such a way that the previously established uses are not being interfered with.³² At this point, the status of the resource vis-à-vis outsiders resembles that of private property: there is (almost) no use that can be made by an outsider that does not interfere with. The difference, though, is that the class of users is greater than one. Between them, the group of users collectively own the resource since the admission of use by another would interfere, and hence they have a right to exclude all third parties. At this stage of development, the resource goes from public property to collective property. Margaret McKean and Ostrom note that stable commons often evolve in precisely this way:

Historically common property regimes have evolved in places where the demand on a resource is too great to tolerate open access, so property rights have to be created, but some other factor makes it impossible or undesirable to parcel the resource itself. (1995: 6)

Where the use of a resource is not diminished by additional users, it remains open to new users. Existing users are free to negotiate with each other about how to mutually alter the resources disposition, but they may not exclude other non-rival uses of the resource. At the point at which (almost) no additional use can be made, the group of existing users has far broader powers of exclusion and may govern the resource as their collective, private property. This would give the users of an overcrowded thoroughfare the right to enforce a traffic management system, and/or charge user fees, for example,

The particular governance mechanism is entirely up the users themselves. They may abstain from formally organising, and simply negotiate with each as and when they need to. When an individual wants to augment her existing use of the resource, in a way which would interfere

³² The question of how bad foot-traffic has to be in order to constitute interference, or how loud the swimmers in the pond have to be to count as interfering with the fishers, for example, is going to vary across social contexts, to the extent that the relevant activities (and what it takes to interfere with them) are differentially constituted across cultural settings.

with another existing user, she needs to obtain the latter's consent, and may have to offer up something in exchange. Without any formal organisation of all the users together, it would be managed through a nexus of such spot-transactions. Depending on the nature of the resource and the use it is being put to, however, this may be extremely costly to the users. Negotiations take time, contractual agreements bring uncertainty. After all, no matter how well specified the contractual arrangement is, it is still possible for one party to renege on the contract *ex post*. This will be a violation of the other's rights, of course, but that is no guarantee it will not happen. Moreover, there will be costs just in discovering who one needs to get the consent of, where the complexity of the resource is such that it is not obvious who one's change of use imposes costs on, and hence who one needs to negotiate with. Where such transaction costs are sufficiently high, it will be efficient for the users to collectively consent to a set of primary rules binding each individual user (Coase 1937; Klein et al 1978). Rather than behaving like interdependent, individual users, they will then behave more like a firm: each following a set of agreed upon rules and procedures, rather than unilaterally negotiating with one another each step of the way. Indeed, if the need to change these rules may be an ongoing possibility, it will be efficient for them to also consent to a set of secondary rules, so that certain among them are empowered to make changes to the primary rules when necessary, without the need for a new consensus. Indeed, it may be easier to obtain consensus on secondary rules rather than directly upon primary rules (Rawls 1955; Brennan & Buchanan 2000: ch. 2).³³

All of these ways in which the use of a collectively owned resource can be made more efficient are entirely open to its users from the perspective of their natural rights to it. The only caveat is that it must be by each user's consent that she be incorporated. Any decision to alter the disposition of the use of the resource that interferes with a non-consenter's ongoing use would be unjust. Even if she herself would "benefit" from being forced into a situation in which her use of the resource is governed by a set of overarching rules, it would still be a violation of her claim to non-interference to conscript her into the firm. The fact that she might be compensated for this rights violation *ex post* does not legitimise the violation *ex ante*.

The forgoing entails that individuals could strategically withhold their consent to

³³ All of this is true, of course, for the set of users of any public property at any given time. The powers they can exercise in tandem over the resource, however, are of course far more limited since they do not have the right to exclude new users.

incorporation in order to increase any compensation she might receive in exchange for her consent. However, others may legitimately threaten the holder-out with sanctions falling short of rights-violations. For example, through ostracism or abstaining from other future contracts that the holder-out is dependent upon. If this all proves ineffective, however, the holder-out remains free, normatively speaking – to hold out. This will present costs to other individuals, but that is the cost of individual's being endowed with natural rights.³⁴

If our rights are merely protected by liability rules – that is, their boundaries can be crossed in exchange for payment of appropriate compensation, in cash or in kind³⁵ – then we cannot be said to be endowed with the power over our rights. Where one has a power to waive or demand compliance with one's rights, a violation of one's rights without a waiver is not legitimised by ex post compensation. Whilst compensation is *required* due to a rights violation, it does not remove the fact that it was a violation. The rights-holder would have been within her rights to forcibly stop the violation in its tracks, regardless of any promise of compensation. Under the view that one's rights merely impose liability rules, it is merely a reserve level of welfare that is protected by rights, rather than our power to make choices with regard to how others interact with us. It is precisely protection from other person's presumptive decisions as to how we might benefit from certain actions that makes rights, in part, attractive (Mack 2000; Zwolinski 2014: 13; Christmas 2017a)

The Role of Convention

As we can now see, the way in which a resource is used by a group is highly instrumental to how the property rights ought to be arranged. From a position of our abstract rights, we cannot know prior to our actual interaction with resources what kind of property system any given set of extra-personal objects and spaces ought to be subject to. All we can say from the armchair is that no one may interfere with the ongoing, non-interfering activities of any other. In order to apply this in the real world, we need to know what constitutes the various activities within which persons subsume extra-personal resources, whether they be productive, recreational, religious, or what have you. Highly contextualised understanding of the particular uses made of resources will be required in

³⁴ Contra Russell (forthcoming).

³⁵ Epstein develops a sophisticated account of property regulation premised on precisely this notion of rights as liabilities rules (1985; 2009; cf. Russell, 2018; forthcoming). Also see Nozick's discussion of rights as being protected by liability rules (1974: ch. 4).

order to make a judgment about what the individual person's natural rights *amount to* – that is, what specific actions may be taken by others without violating those rights.

The social conventions regarding the constitution of the relevant activities therefore furnish person's natural rights with content. Of course, conventions that permit others to acquire rights to interfere with the activities of others have no standing here, neither would conventions that permit one group of persons to conscript others into cooperation without their consent. Natural rights in the abstract tells us that much. The role that actually-existing conventions do play is in telling us what kinds of actions count use, interference, or consent. The theory of natural rights normatively orders these act-types, but only social convention can tell us what actual behaviours constitute these act-types.³⁶

A description of our natural rights cannot tell us what counts as fishing, hiking, drilling for oil, building houses, etc. We can only get that from an anthropological study of how these activities are in fact engaged in, based upon hermeneutical understanding of what makes them different and similar from one another.³⁷ The kind of information required to “fill in” our natural rights is not immediately legible, so there are strong barriers to the extent to which we should expect states to be able to accurately formalise property rights in the more complex cases of actively evolving commons.³⁸ Therefore any successful institutionalisation of the rights therein is likely to be achieved outside out of the positive law of central political authorities (cf. Ostrom et al. 1992; Ellickson 1994).

The theory of natural rights only tells us, once someone is engaged in one of these activities, others have a duty not to interfere. Therefore, a correct application of the Lockean principle is

³⁶ To invoke John Searle's distinction between regulative and constitutive conventional rules (Searle 1969: 33-42; 1995: ch. 2): natural rights tell us what regulative rules we ought to have, but social convention stipulates the constitutive rules of the activities the regulative rules actually regulate.

³⁷ As Peter Winch says, the criteria for judging ‘that, in two situations, the same thing has happened, or the same action performed, must be understood *in relation to*... considerations of the kinds of activity in question.’ (Winch 1990: 86-87). Similarly, Friedrich Hayek writes the following.

As long as I move among my own kind of people, it is probably the physical properties of a bank note or a revolver from which I conclude that they are money or a weapon to the person holding them. When I see a [person from a novel culture] holding cowrie shells or a long, thin tube, the physical properties of the thing will probably tell me nothing. But the observations which suggest to me that the cowrie shells are money to him and the blowpipe a weapon will throw much light on the object – much more light that these same observations could possibly give if I were not familiar with the conception of money or a weapon. In recognizing the things as such, I begin to understand the people's behaviour. I am able to fit into a scheme of actions which “makes sense”. (1948, 65-66)

³⁸ On the importance of legibility to the consolidation of a state's power, see Scott (1998: chs 1-2).

going to look different in different social contexts because the salient understandings of what constitute the relevant activities will be different.

Conclusion

In this paper I have attempted to show that a modified version of the Lockean principle of original acquisition offers a deontic justification for both private ownership and various forms of commons with regard to natural resources, as and when they are appropriate to the resource, and the way in which persons actually interact with it. Lockeanism often involves an implicit bias in favour of private property, which means Lockeans often invoke a proviso, to account for those whose interest in autonomous project pursuit is ill served by a system of pure private property. Removing this bias, and problematising the relationship between persons' interest in autonomous project pursuit and property rights, rather than assuming the former to always be served by private ownership, allows us to formulate a principle that gives just enough property-based protection as is called for. A claim against interference in one's ongoing activities captures the basic liberal impulse behind the various interpretations of Lockeanism, and entails a far more flexible principle of acquisition. Under ambidextrous Lockeanism, the commons often turn out to be protected not by some countervailing principle that checks a prior power to privatise resources, but by the principle of acquisition itself.

Ambidextrous Lockeanism ought to be viewed as a far more palatable approach to natural rights theory. Firstly, it can deal with the complexities of resource usage without having to ultimately kick away the deontological ladder that gets one into property rights in the first place, in favour of cost-benefit analysis at the margins. We can afford to think about natural resource governance in terms of natural law when we adopt the ambidextrous view, unlike the account that takes private ownership as a panacea. Secondly, removing the bias in favour of private ownership reveals the true relation between one's personhood and one's property rights. The hand-waiving from liberty to private property is often viewed as a disingenuous, ideological Trojan horse for political *laissez faire* (Barry 1975; Nagel 1975; Murphy & Nagel 2002; Rossi & Argenton 2017). However, in showing when and why our fundamental interest in autonomous project pursuit does and does not entail private property shows that the connection between person and property is in fact robust. And moreover, that any free market economy underwritten by this account of natural rights is one that includes public and collective property as much as private property.

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